

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michelle Rivera,	:	
Petitioner	:	
	:	
v.	:	No. 2094 C.D. 2013
	:	
State Civil Service Commission	:	
(Pennsylvania Board of Probation	:	
and Parole),	:	
Respondent	:	
	:	
	:	
Pennsylvania Board	:	
of Probation and Parole,	:	
Petitioner	:	
	:	
v.	:	No. 192 C.D. 2014
	:	Submitted: October 17, 2014
State Civil Service Commission	:	
(Rivera),	:	
Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT

FILED: April 22, 2015

Michelle Rivera petitions for review of an adjudication of the State Civil Service Commission directing the Pennsylvania Board of Probation and Parole to reinstate her to employment but in a demoted position. The Commission held that Rivera was negligent because she failed to exercise the good judgment and leadership expected of a management level employee. Nevertheless, it

concluded that Rivera's negligence warranted at most a demotion without backpay, not a discharge. The Parole Board has cross-petitioned for a review of the Civil Service Commission's modification of its discipline.

Rivera began working for the Parole Board in 1998 as a parole agent. In 2002, the Parole Board promoted her to parole supervisor and, in 2007, to Deputy District Director of the Philadelphia Northwest Division. As Deputy District Director, Rivera was not involved in the day-to-day supervision of parolees and probationers. Rather, she supervised others who had this responsibility. Rivera was also responsible for reviewing case files and requesting warrants for the arrest of parolees and probationers. Rivera supervised Rosa Hernandez, who in turn supervised Jose Rodriguez, a parole agent.

A "special probationer" is an offender who has served the incarceration portion of his criminal sentence and has been transferred to the probation portion of his sentence. Under a "special probation," the terms of probation and any adjustments or modifications thereto are dictated by the sentencing court. Commission Adjudication at 4, n.1. One of the special probationers assigned to Rodriguez was Rafael Jones.

In February 2012, Jones was arrested on criminal charges, but they were dismissed in June 2012. At a court hearing on July 25, 2012, Rodriguez recommended that Jones be released from prison and returned to probation. The court ordered Jones to be placed under house arrest for six months; complete community service; obtain a GED; and submit to weekly drug testing. The court instructed, orally, that consistent with its order, Jones should be immediately returned to prison should he test positive for illegal drugs. Rodriguez advised Hernandez of the judge's oral directive on drug testing but not Rivera.

On August 8, 2012, Jones was released from incarceration and returned to his home to serve probation under house arrest. On August 10, 2012, he reported to the probation and parole office and tested positive for marijuana and opiates. He was not incarcerated as had been ordered by the court. On August 15, 2012, Jones reported to the probation and parole office, and he tested positive for drugs. Again, he was not arrested.¹

Jones was scheduled to report to the parole office on August 22, 2012, between 8:30 a.m. and 4:00 p.m. On August 21, 2012, Rodriguez learned that Jones was a suspect in the murder of a Philadelphia police officer and relayed this information to Rivera. She directed him to make sure Jones' file was up to date. Rodriguez called Jones on his cell phone and directed him to report to the office before 12:00 p.m. on August 22, 2012.

Early in the morning of August 22, 2012, Joseph Gillespie, the supervisor of the Parole Board's Fugitive Apprehension Search Team, sent Rivera the following e-mail message:

It would be beneficial if we can get Jones in 29 status asap. I know he is to report today but Rodriguez told me that the judge stipulated one hot urine he was to be arrested and he has submitted a few.

¹ Both Hernandez and Rodriguez were disciplined in connection with the Jones case. Rodriguez was dismissed for not enforcing the terms of Jones' electronic monitoring; for not keeping accurate records of Jones' supervision; and for not having Jones arrested when he failed the urine tests. *See* Notes of Testimony February 15, 2013, at 231-32 (N.T., 2/15/13, at ____). Hernandez was dismissed for not ordering the arrest of Jones when he tested positive for marijuana. *See* Notes of Testimony March 27, 2013, at 454 (N.T., 3/27/13, at ____).

Reproduced Record, Exhibit AA-12 (R.R. ____).² Because Rodriguez was unavailable, Rivera directed Hernandez to prepare the arrest warrant documents; Rivera reviewed and approved them. At approximately 10:50 a.m., the arrest warrant request was submitted to the probation office of the Philadelphia County Court of Common Pleas. The request stated that Jones was “Non-reporting – Absconded – Effective Date of Delinquency: 8/22/2012.” R.R., Exhibit AA-13. The warrant request did not state the time of Jones’ delinquency.

Jones was arrested at approximately 2:00 p.m. that afternoon by Federal marshals. N.T., 2/15/13, at 112. He was later charged for the murder of the police officer.

On November 30, 2012, the Parole Board discharged Rivera for violating its Code of Conduct in her handling of the Jones case.³ Specifically, the Parole Board found that the Jones arrest warrant was inaccurate and that Rivera knew this when she approved the arrest warrant documents prepared by Hernandez. Rivera appealed to the Commission, and it conducted hearings on February 15, 2013, and March 27, 2013.

At the hearing, Rivera testified that she was contacted at 5:56 a.m. the morning of August 22, 2012, by Gillespie about the urgency to have Jones taken

² The reproduced record does not have pagination.

³ Sections B.12.b and B.12.c of the Code of Conduct state:

12.b. Reports submitted by employes shall be truthful and no employe shall knowingly enter or cause to be entered any inaccurate, false or improper information or data, or misrepresent the facts in any agency or Commonwealth report or record.

12.c. No employe shall knowingly omit information which is relevant, essential, pertinent, and/or applicable to the agency or Commonwealth report or record.

R.R., Exhibit AA-1.

into custody. Commission Adjudication at 14-15. She described the “frantic” effort to arrest a high profile murder suspect on a morning where her office was evacuated for a fire drill. N.T., 3/27/13, at 474. During the fire drill, Gillespie called Rivera on her Blackberry and asked her to “hurry up” because the police knew Jones’ approximate location. *Id.* at 475. Rivera called the court and explained the need for an arrest warrant so detectives could enter the house where Jones was located. She explained the whole situation and the need “to get him into wanted status.” *Id.* at 479. Rivera testified that the court’s probation office “agreed with me.” *Id.*

Rivera testified that she approved the arrest warrant documents prepared by Hernandez because Jones was, in fact, an absconder. She was advised by Gillespie that Jones was not coming in because he had discarded his cell phone immediately after Rodriguez called him on August 21, 2012. She testified as follows:

A. So everybody’s in an uproar trying to get this offender. And Gillespie had intelligence information that I know he couldn’t share everything with me, because that would, you know, compromise it with the marshals and everybody else that was there that’s involved.

So I trusted him because he’s a Board employee to say, you know, this is what we need to do. He’s specialized to handle that. And he said Michelle, he’s not coming in. He said he’s not coming in. *He said he got rid of the cell phone right after Rodriguez called him.*

* * *

N.T., 2/15/13, at 147 (emphasis added). Gillespie called her again, explained Rivera,

[a]nd at that point, I was taking all action to get this guy, to assist the police, Gillespie and everybody else, to get him into custody.

BY ATTORNEY ROBINSON:

Q. My question is very simple. Was Rafael Jones an absconder as of the time you submitted the documents to the Board?

A. According to Rodriguez, yes. Yes, he was an absconder with the intelligence information that I had, he was. But if you're looking at what --- Rodriguez instructing him to report --
-.

Q. It's a yes or no question.

A. Yes, he was an absconder. He was not going to report.

Id. at 148. Upon further questioning by the Parole Board's counsel, Robinson, Rivera testified:

Q. Okay. So he had up until 12:00 to report, after which he could have been declared as an absconder?

A. And he could be. But because I had intelligence information that he was not going to report, that's why he was declared delinquent. We use that all the time.

Id. at 148-49.

According to Rivera, Jones became an absconder because he could not be contacted or tracked after he threw away his phone. This was the basis of his delinquency. Rivera also testified that it was common practice to submit arrest warrant requests where a probationer is "wanted" as a suspect in a crime and could pose a threat to public safety. That was true of Jones, who was wanted in a serious

crime. She testified that being “wanted” and being an “absconder” have the same meaning.

Rivera also presented testimony from Gillespie, who sent Rivera the e-mail at 5:56 a.m. the morning of August 22, 2012. He testified that he asked Rivera to place Jones on “29 status ASAP,” explaining:

A. I made this request due to the fact that the information I had at the time was that he should’ve been detained or a warrant issued for his arrest for one hot urine. The information that I had was that he had submitted a few and there was no action taken. That, and a culmination of the fact that he is a suspect in the homicide of a Philadelphia police officer, and a danger to the community? Yes.

Q. Okay. So it’s both factors, the fact that he had ---

A. Yes.

Q. --- a hot urine, and the fact that he was a suspect in connection with the murder of a police officer. That’s why you asked that he be placed on 29 status ASAP?

A. Yes.

Q. Okay. Even though you knew he was to report at a time after 5:56 a.m.?

A. Yes.

N.T., 3/27/13, at 453-54. On follow-up, the following exchange took place:

BY ATTORNEY GOLD:

Q. Is it a fact that the only reason why you called Michelle Rivera, or you had e-mailed Michelle Rivera, was because he was a suspect in connection with murdering a police officer, not because he had a hot urine?

HEARING OFFICER:

Answer the question ---

A. Yes.

HEARING OFFICER:

--- if you can.

A. It was a high profile case.

Id. at 456-57. Gillespie confirmed that “29 status” was considered “wanted status.” *Id.*

Q. Isn’t it a fact, sir, the term absconder and wanted status are used interchangeably by the Department of Probation and Parole?

A. Yes.

Id. at 459. Finally, Gillespie confirmed that he told Rivera that Jones was not going to report. *Id.* at 464.

Rivera’s supervisor, Daniel McIntyre, testified about two interviews of Rivera that he conducted with another supervisor in November of 2012. The interviews established that Hernandez prepared the court documents and that Rivera approved them. Testifying from notes of the November 8, 2012, interview, McIntyre stated that in response to “a follow-up” question, Rivera stated “yes and no” when asked if Jones was an absconder when the arrest warrant request was submitted to the court.

The Civil Service Commission set aside the Parole Board’s termination of Rivera’s employment. It ordered her reinstated but as a parole agent and with no backpay. Based on McIntyre’s testimony, the Commission found that Rivera had acknowledged to her supervisors that Jones was not an absconder when the arrest warrant requests were submitted to the court. Commission Adjudication,

Finding of Fact Nos. 20 and 21. Based on these and other findings, the Commission concluded:

[I]t is equally evident from the record that [Rivera]’s apparent failure to recognize or consider available options or to delay implementing the chosen option until the 12:00 deadline constitutes an exercise of poor judgment under pressure and a failure to exercise leadership on what she recognized to be a high-profile matter; to our minds these failures demonstrate that she should not continue to hold a managerial or supervisory position with the [Parole Board].

Commission Adjudication at 33-34. The Commission held that Rivera’s conduct did not warrant her removal from employment because Rivera had a solid personnel record. However, because of her role in the preparation of the Jones arrest warrant, the Commission concluded that Rivera should be removed from her supervisory position and demoted without backpay. Rivera petitioned for this Court’s review, and the Parole Board has cross-petitioned.⁴

On appeal, Rivera raises several arguments. First, Rivera challenges the Commission’s factual finding that she admitted to her supervisors that Jones was not an absconder when the arrest warrant documents were submitted to the court. Rivera contends these findings are not supported by substantial evidence. Second, Rivera contends that the record does not support the Commission’s decision to demote her to parole agent or to deny her backpay. In its cross-petition, the Parole Board argues that the Commission erred in concluding that the Parole Board lacked just cause to discharge Rivera.

⁴ Our review determines whether constitutional rights have been violated, errors of law have been committed, or whether the findings of fact are supported by substantial evidence. *Pennsylvania Department of Corrections v. State Civil Service Commission (Clapper)*, 842 A.2d 526, 531 n.7 (Pa. Cmwlth. 2004).

We begin with a review of the relevant law. An appointing authority, such as the Parole Board, has the burden to prove just cause for removing an employee. *Pennsylvania Board of Probation and Parole v. State Civil Service Commission (Manson)*, 4 A.3d 1106, 1111 n.8 (Pa. Cmwlth. 2010). The Commission is the sole fact finder in civil service cases and exclusively determines the credibility and weight to be given to evidence. *Bosnjak v. State Civil Service Commission (State Correctional Institution at Albion)*, 781 A.2d 1280, 1286 (Pa. Cmwlth. 2001). Accordingly, this Court reviews the evidence and all reasonable inferences arising therefrom in the light most favorable to the prevailing party. *Id.*

Nevertheless, the Commission's findings of fact must be supported by substantial evidence. *Pennsylvania Department of Corrections*, 842 A.2d at 531 n.7. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Scott v. Unemployment Compensation Board of Review*, 36 A.3d 643, 647 n. 4 (Pa. Cmwlth. 2012). The existence of conflicting testimony or evidence does not mean that the findings of fact are not supported by substantial evidence. *Harper v. Pennsylvania Board of Probation and Parole*, 520 A.2d 518, 523 (Pa. Cmwlth. 1987).

Rivera argues that Findings of Fact No. 20 and 21, which state that Rivera had admitted to her superiors that she knew Jones was not an absconder when she approved the warrant request filed with the court, are not supported by substantial evidence. Rivera argues that she never made such an admission but has always maintained that Jones was, in fact, an absconder when the documents were submitted to the court. He became an absconder when he took affirmative steps to evade authorities. Further, she contends that the Commission took her statements made in November 2012 in an informal interview out of context.

We begin with Finding of Fact No. 21. It states:

On November 20, a fact finding conference was conducted. N.T. p. 332. During the fact-finding, [Rivera] acknowledged that she reviewed the request after it was prepared by Hernandez; [Rivera] further acknowledged that at the time she submitted the request, Jones was not an absconder. N.T. pp. 335-336.

Commission Adjudication at 9; Finding of Fact No. 21. To support this finding, the Commission cited the following testimony of David McIntyre, Rivera's supervisor. He stated:

Q. Okay. And during the fact-finding conference, did you ask Ms. Rivera whether or not Mr. Jones was an absconder when these documents were prepared?

A. I did.

Q. And what was her response?

A. *She answered yes and no.*

N.T., 3/27/2013, at 335 (emphasis added). The second sentence of Finding of Fact No. 21, *i.e.*, that "Rivera acknowledged" that Jones was not an absconder, is not supported by McIntyre's statement that Rivera's answer was "yes and no."

McIntyre typed Rivera's responses to questions put to her by a Parole Board employee identified only as "Mr. Dash." At the Commission hearing, McIntyre testified from these notes, but his notes were not admitted into evidence.⁵

⁵ The Parole Board did place into evidence a series of written questions that were given to Rivera prior to November 8, 2012, during the Board's investigation. These exhibits include Rivera's written responses. The focus of these questions was whether Rivera knew about the "one hot urine" condition. There were no questions about whether Jones was an absconder when she submitted the warrant request to the court. Exhibit AA-19 at 1-16; Exhibit AA-20 at 1-7.

Rivera contends that her out-of-court statements are hearsay. Although a party admission against interest can be an exception to the hearsay rule, McIntyre's testimony did not establish an admission by Rivera. He described her reply as "yes and no." This is ambiguous, particularly because the precise question put to her was not put in the record. Acknowledging that the warrant request was transmitted before noon is not an admission; it was not a point in dispute. Simply, the Commission's finding in Finding of Fact No. 21 that "[Rivera] further acknowledged that at the time she submitted the request, Jones was not an absconder" is not supported by McIntyre's testimony.

Commission Finding of Fact No. 20 is beset by the same problems. It states:

On November 8, 2012, [Rivera] was interviewed regarding the Jones case. N.T. pp. 348-349. When asked whether Jones was an absconder at the time the request was submitted, [Rivera] acknowledged he was not. N.T. 354.

Commission Adjudication at 9; Finding of Fact No. 20. The cited testimony of McIntyre follows:

Q. Okay. And did you discuss this transmittal letter with Ms. Rivera, when you spoke to her on the 8th of November?

A. I believe I did.

Q. Okay.

A. Or we did. Yes.

Q. Okay. Did you ask her when this was - if this was sent to the court?

A. Are you referencing a specific page?

Q. I can direct you to page seven.

A. Thank you. I see reference to attachment 15. We asked, what time were they sent on the 22nd.

Q. Okay. And what was her response?

A. That morning.

Q. Okay. Did Ms. Rivera indicate whether [Jones] was actually an absconder at that point?

A. The follow-up question was, [Jones] wasn't really an absconder when [the request] was sent, was he? Actually, no, was the response.

N.T., 3/27/13, at 353-54. The underlying question was that the documents were sent "that morning." Under the questioner's definition of absconding, Jones was not an absconder until noon. Responding "actually no" simply concedes that using the questioner's definition of "abscond," Jones would not be an absconder until noon.

The arrest warrant request was submitted under cover of a form entitled "Transmittal Letter." That form identifies the date of delinquency as August 22nd; it does not state a specific time for the delinquency. Rivera testified that once Jones broke communication with authorities by disposing of his cellphone, he became an absconder, by her understanding of the term, or "delinquent." She also testified that "wanted" and "absconder" are interchangeable terms, as did Hernandez and Gillespie.

The "transmittal letter" sent to the court was a form that contained no option for "wanted;" it stated as follows:



TRANSMITTAL LETTER

TO: (Name) HONORABLE JUDGE SUSAN L SCHULMAN
(Office) PHILADELPHIA COUNTY COURT OF COMMON PLEAS
(Office) 1301 FILBERT STREET, SUITE 1209, PHILADELPHIA, PA. 19107

RE: (Offender Name) RAFAEL JONES
PAROLE NO: 757EX
CPCMS DOCKET NO(S): CP-51-CR-0000848-2008

CHANGE(S) IN STATUS

- ARREST
TECHNICAL VIOLATION(S)
NEW CRIMINAL CHARGE(S)
PROBATIONER DETAINED AT BOARD WARRANT FILED ON:
BENCH WARRANT HAS BEEN/WILL BE REMOVED ON:
ON BAIL

ARREST DISPOSITION

- PRELIMINARY HEARING HELD/WAIVED ON:
CONVICTED OF NEW CRIMINAL CHARGE(S)
CRIMINAL CHARGE(S) DISMISSED, WITHDRAWN, NOLLE PROSEQUI, ACQUITTAL

ABSCONDER / CLOSURE / TRANSFER

- NON-REPORTING - ABSCONDED - EFFECTIVE DATE OF DELINQUENCY: 08/22/2012 SEE

RECOMMENDATION*

- MAXIMUM SENTENCE EXPIRED:
BOARD HAS CLOSED INTEREST:
ACCEPTANCE FOR SPECIAL SUPERVISION BY THE BOARD IS RESCINDED: SUPERVISION ACCEPTED AND TRANSFERRED, VIA INTERSTATE COMPACT, TO THE STATE OF:
OTHER: CORRESPONDENCE/DOCUMENTS ATTACHED

RECOMMENDATION(S)

- HOLD IN CONFINEMENT PENDING DISPOSITION OF TECHNICAL VIOLATION(S) CRIMINAL CHARGES
ISSUE COURT WARRANT AND ENTER INTO CLEAN / N.C.I.C. (Please reply within 5 business days)
CONTINUE SUPERVISION PENDING DISPOSITION OF TECHNICAL VIOLATION(S) CRIMINAL CHARGES
CONTINUE PROBATION/PAROLE
SCHEDULE GAGNON I HEARING** (see below) AGENT TO SUBMIT FULL HEARING PACKET.
SCHEDULE GAGNON II HEARING** (see below) AGENT TO SUBMIT FULL HEARING PACKET.
REQUEST AUTHORITY TO CLOSE BOARD INTEREST (SEE ATTACHED SPECIAL FIELD REPORT)
EARLY TERMINATION (COURT ORDER REQUESTED)
ADD/MODIFY SPECIAL CONDITIONS per 42 Pa.-C.S.A. § 9771(d)
OTHER:

RESPECTFULLY SUBMITTED,

Signature box containing ROSA HERNANDEZ, PAROLE SUPERVISOR AD, SIGNATURE, and DATE 08/22/2012

**PER RULE 708 OF THE RULES OF CRIMINAL PROCEDURE - VIOLATION OF PROBATION, INTERMEDIATE PUNISHMENT, OR PAROLE: HEARING AND DISPOSITION (A) A WRITTEN REQUEST FOR REVOCATION SHALL BE FILED WITH THE CLERK OF COURTS

- cc: PBPP Division of Court Services - Suite 5900
PBPP Division of Interstate Probation Services - Suite 5450
County Chief Adult Probation Officer/Director
Clerk of Courts



PA Board of Probation and Parole | Philadelphia Northwest Division
301 E. Chelton Avenue, 1st Floor, Philadelphia, PA 19144
Phone: 215-560-4685 | Fax: 215-560-2036 | www.pbpp.state.pa.us

R.R., Exhibit AA-13. Rivera testified that she checked the box for "absconder" because there was no box for "wanted." Specifically,

Q. And let's take a look at A-13,^[6] which is the request the transmittal letter to the court, that was sent out by Ms. Hernandez. There has been a lot of hullabaloo about the fact that you characterized Mr. Jones as an absconder, and you checked the non-reporting box and the effective date of delinquency. Can you tell us why you checked that box?

A. **Because they don't have --- the Board doesn't have a box for wanted. Had it had wanted, we would have placed wanted.** I'm quite sure the Chairman testified that he's changing all the reports as opposed to what happened in this case.

N.T., 3/27/13, at 484 (emphasis added). The transmittal document, Exhibit AA-13, lacks space for an explanation of when or how Jones became an absconder. As a result of the Jones case, the Parole Board has changed the form.

The Parole Board's theory is that the "transmittal letter" could be construed one way alone: that Jones failed to appear at a scheduled meeting with his supervising agent. It argues, then, that the form was inaccurate when submitted at 10:53 a.m. because Jones did not have to appear until noon. That is one definition of "absconder," as acknowledged by Rivera. However, Rivera, Gillespie and Hernandez testified that "being wanted" for a crime and "absconding" are interchangeable terms.

Given the equivocal nature of McIntyre's "yes and no" response and the elliptical nature of McIntyre's account of the November interview of Rivera, his testimony does not support a finding that Rivera made an admission that she approved a false document. Rivera's so-called "admission" appears to be nothing more than a concession that under McIntyre's definition of absconding, Jones

⁶ The transcript is in error. The referenced exhibit was "AA-13."

would not have been an absconder until noon. McIntyre’s testimony does not support either Finding of Fact No. 20 or 21.

Because Findings of Fact No. 20 and 21 are not supported by substantial evidence, the Commission erred in relying on those findings to reach its conclusion that Rivera negligently submitted a “transmittal letter” to the court that was not “factual,” in McIntyre’s words. Commission Adjudication at 21. Whether Rivera’s conduct was negligent requires further findings; therefore, a remand is required. On remand, the Commission must determine, based on the evidence presented, the meaning of the term “absconder” or “delinquency.” The Commission must make a finding about whether the terms “absconder” and “wanted” were used interchangeably by employees of the Parole Board, as Rivera and Gillespie testified. Finally, the Commission must identify the factual deficiencies in the “transmittal letter” that Rivera submitted to the court. Based upon its findings on the foregoing items, the Commission must then reconsider whether Rivera’s conduct was negligent and what, if any, discipline is warranted.

For these reasons, we vacate the Commission’s order and remand for consideration of the record in accordance with the above opinion.⁷

MARY HANNAH LEAVITT, Judge

⁷ Because we accept Rivera’s first argument, we need not address her additional argument nor the Parole Board’s cross-petition concerning the Commission’s modification of Rivera’s punishment.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michelle Rivera,	:
Petitioner	:
	:
v.	: No. 2094 C.D. 2013
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State Civil Service Commission	:
(Pennsylvania Board of Probation	:
and Parole),	:
Respondent	:
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Pennsylvania Board	:
of Probation and Parole,	:
Petitioner	:
	:
v.	: No. 192 C.D. 2014
	:
State Civil Service Commission	:
(Rivera),	:
Respondent	:

ORDER

AND NOW, this 22nd day of April, 2015, the order of the State Civil Service Commission dated September 30, 2013, in the above-captioned matter is hereby VACATED and this matter is REMANDED for further proceedings consistent with this opinion.

Jurisdiction relinquished.

MARY HANNAH LEAVITT, Judge